Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–03 OF 2004 (J)
HAIDAR CJ (MALAYA), SITI NORMA YAAKOB AND ALAUDDIN FCJJ
22 OCTOBER 2004

Company and Corporations — Shares — Transfer of shares — Beneficial interest and legal interest — Whether beneficial interest could pass to another despite non-compliance with articles of association — Restrictions on right to transfer shares — Whether there was no compliance with articles of association — Companies Act 1965 s 6A

The appellant entered into an agreement with the respondent to sell the respondent 8,039 shares in Chan Tiong Kwai Realty Company Sdn Bhd ('CTK') subject to the approval of CTK's board. The purchase price was paid in full. Pending the approval, the appellant pledged 32,630 Son Huut Plantation Sdn Bhd's shares ('SHP shares') as collateral. It was a term under the agreement that in the event the appellant failed to transfer the CTK shares within three months for any reason whatsoever, the respondent had the option to either transfer the SHP shares to himself or his nominee or to claim refund of the purchase price. After one and a half years, the appellant still had not obtained the requisite consent, the respondent elected to transfer the SHP shares. The appellant refused. The respondent commenced an action for specific performance in the High Court and proceeded with an application under O 81 of the Rules of the High Court 1980. The High Court ruled that the respondent was the beneficial owner of SHP shares. The appellant appealed against the decision. The respondent was dissatisfied that the High Court did not rule that it was the registered owner of the shares and cross-appealed. The primary issue in this appeal was whether the beneficial interest in shares can pass where there was non-compliance with the restriction on transfer of shares provisions in the articles of association.

Held, dismissing the appellant's appeal and allowing the respondent's cross-appeal:

(1) The beneficial interest passes to the purchaser of shares upon his full payment and execution of the transfer documents, notwithstanding that the provisions of the articles of association restricting transfer of shares have not been complied with. Those restrictions do not affect and have no application or bearing on the passing of beneficial interest and apply only to restrict the registration of legal interest (see para 60).

(2) Court of Appeal was correct in holding that there has in fact been compliance with the articles and that the Board should be directed to transfer and register the SHP shares in the respondent's name. Any refusal by the Board was to be considered mala fide and not in good faith as there was no member willing or able to purchase the shares at the material time and in addition the appellant had secured the Board's prior approval to transfer the SHP shares to the respondent. In the circumstances, the respondent was both the beneficial and registrable owner of the SHP shares (see para 71).

[**Bahasa Malaysia summary**

Perayu memasuki satu perjanjian dengan responden untuk menjual kepada responden 8,039 saham di dalam Chan Tiong Kwai Realty Company Sdn Bhd (CTK) tertakluk kepada persetujuan lembaga pengarah CTK. Harga belian telah dibayar penuh. Sementara menunggu persetujuan, perayu mencagarkan 32,630 saham Son Huut Plantation Sdn Bhd (saham SHP) sebagai jaminan. Adalah menjadi satu terma di dalam perjanjian tersebut bahawa jika sekiranya perayu gagal untuk memindahkan saham CTK atas apa-apa sebab sekalipun, responden mempunyai pilihan sama ada untuk memindahkan saham SHP kepada dirinya atau penamaannya atau menuntut kembali harga belian. Selepas setahun setengah, perayu masih belum mendapat persetujuan yang diperlukan, responden memilih untuk memindahkan saham SHP. Perayu tidak menolak. Responden memulakan tindakan untuk pelaksanaan spesifik di dalam mahkamah tinggi dan meneruskan permohonan di bawah A 81 Kaedah-kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi memutuskan bahawa responden adalah pemilik benefisial saham SHP. Perayu merayu terhadap keputusan tersebut. Responden tidak berpuas hati kerana Mahkamah Tinggi tidak memutuskan yang ia adalah pemilik berdaftar saham tersebut dan merayu balas. Isu utama dalam rayuan ini adalah sama ada kepentingan benefisial dalam saham boleh berpindah bila mana terdapat ketidakpatuhan dengan peruntukan sekatan pemindahan saham dalam perkara-perkara persatuan.

Diputuskan, menolak rayuan perayu dan membenarkan rayuan balas responden:

(1) Kepentingan benefisial boleh berpindah kepada pembeli saham apabila harga belian dibayar penuh dan pelaksanaan dokumen-dokumen pindah milik dibuat, meskipun peruntukan sekatan pindah milik saham di dalam perkara-perkara persatuan tidak dipatuhi. Sekatan tersebut tidak memberi kesan dan tidak terpakai kepada pemindahan kepentingan benefisial dan hanya terpakai untuk menyekat pendaftaran kepentingan di sisi undang-undang (lihat perenggan 60).

(2) Mahkamah Rayuan adalah betul dalam memutuskan bahawa sememangnya terdapat kepatuhan perkara-perkara dan bahawa lembaga pengarah mestilah diarah memindahkan dan mendaftarkan saham SHP kepada nama responden. Sebarang penolakan oleh lembaga pengarah boleh dianggap *mala fide* dan bukan dengan suci hati kerana tiada ahli yang sanggup atau berkeupayaan membeli saham tersebut pada masa matan dan tambahan pula perayu telah mendapat persetujuan lembaga pengarah terlebih dahulu untuk memindahkan saham SHP kepada responden. Dalam keadaan ini, responden adalah pemilik benefisial dan berdaftar saham SHP (lihat perenggan 71).]

Notes

For cases on transfer of shares, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 795–822.

Cases referred to

Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd & Ors [1988] 3 MLJ 185 (refd)
Gan Sin Tuan v Chew Kian Kor [1958] MLJ 62 (refd)
Mohamed Yahaya v MS Ally Sdn Bhd & 11 Ors [1985] 1 MLJ 243 (refd)
Hawks v McArthur & Ors (1951) 1 All ER 22 (refd)
Ling Beng Hui & Ors v Ling Beng Sung [1990] 2 MLJ 186 (refd)
Liu, Ren-Shuenn v Lee, Chiu-Pin [1999] 2 CLJ 35 (refd)
Niord Pty Ltd v Adelaide Petroleum NL [1990] ACLC 684 (refd)
Re Fernlake Pty Ltd [1994] 12 ACLC 453 (refd)

Legislation referred to

Rules of the High Court 1980 O 81
Companies Act 1965 ss 6A, (6), (10), 33(1), 69

Manian Raju (Ng Chew Hor and Indran Guruwith with him) (Ng, Fan & Assoc) for the petitioner.

Dato M Pathmanathan (Datin Shanti Patmanathan and Tho Kam Chew with him) (Gulam & Wong) for the respondents.

Alauddin FCJ (delivering judgment of the court):

[1] The respondent had on 8 January 1998 filed an application under O 81 of the Rules of the High Court 1980 ('RHC') for:

(a) (i) a declaration that the respondent (ie the plaintiff) and/or his nominee is the registered and beneficial owner of all the 32,630 ordinary shares of RM1 each in Son Huut Plantation Sdn Bhd ('SHP'); and

(ii) that the company secretary of SHP do register the respondent and/or his nominee as the legal and beneficial owner of all the said 32,630 shares

(b) damages to be assessed; and

(c) costs.

[2] The learned High Court judge had on 3 June 1999 made the following orders:

(a) a declaration that the respondent or his nominee is the beneficial owner of all the 32,630 ordinary shares of RM1 each in SHP;

(b) damages if any are to be assessed by the senior assistant registrar;

(c) costs.

[3] The learned High Court judge however, dismissed that part of the respondents' application directing the secretary of SHP to register the respondent and/or his nominee as the registered and beneficial owner of all the 32,630 shares in SHP.

[4] The appellant was dissatisfied with the decision of the High Court judge and had appealed against that part of the decision stated in para (a) above.

[5] The respondent on the other hand filed a cross-appeal against that part of the decision of the learned judge dismissing the respondent's application for the order against the secretary of SHP.

[6] On 3 April 2002, the Court of Appeal dismissed both the appeal of the appellant and the cross-appeal of the respondent. Dissatisfied with the decision the appellant applied to this court for leave which was granted on 3 March 2004. According to the order granting the leave, the following question was posed for the determination of this court:

> Whether the beneficial interest (but not the legal interest) in the shares of a private limited company can pass from a vendor to a purchaser upon the purported disposal of the said shares in non-compliance with the restriction on transfer of shares provisions contained in the articles of association of the said private limited company ie the shares must be offered to the existing members of the company before it may be transferred to a non-member of the company.

[7] The respondent was also given leave and filed a cross-appeal on 17 March 2004.

FACTUAL BACKGROUND

[8] The appellant had entered into an agreement with the respondent vide an agreement dated 16 December 1995 to sell to the respondent 8,039 ordinary shares in a private limited company named as Chan Tiong Kwai Realty Co Sdn Bhd ('CTK') at the purchase price of RM270,000 subject to the approval of the Board of Directors of CTK.

[9] The consideration of RM270,000 was paid in full to the appellant and the appellant acknowledged receipt of the same on the date of execution of the said agreement.

[10] The respondent nominated his daughter, Chan Ai Lian, to take up the said 8,039 shares (the sale shares) in CTK.

[11] The appellant was to take immediate steps to obtain the requisite consent to sell and transfer the sale shares to the respondent within three months of the agreement (see cll 2 and 5).

[12] Pending the said approval, the appellant pledged the 32,630 ordinary shares in SHP as a collateral to secure the said payment of RM270,000 pending the completion of the transfer of the sale shares in the said company to Chan Ai Lian.

[13] The appellant executed and deposited valid and transferable transfer documents in escrow for the 32,630 SHP shares together with the relevant share certificates with Messrs Gan & Lim, a firm of solicitors as stakeholders to give effect to the option (see cl 4).

[14] In the event of the appellant failing to transfer the sale shares within three months of the agreement for 'any reason whatsoever' the appellant agreed that the respondent has the option to elect to either:

(i) transfer to himself the appellant's 32,630 shares in SHP or to his nominee; or

(ii) claim a refund of RM270,000 from the appellant (see cll 6 and 7).

[15] The appellant did not take any steps whatsoever to obtain the requisite consent or approval for the sale shares within three months or at all or communicate or otherwise inform the respondent.

[16] On 6 May 1997 ie some 1½ years later, on the respondent's instructions, Messrs Gan & Lim informed the appellant of the respondent's election to transfer to himself the 32,630 shares in SHP (see pp 240 and 337 of the appeal record).

[17] On 22 September 1997, through his solicitors the appellant replied to the respondent's solicitors saying:

(a) it is well within the knowledge of your client that the majority of the board of directors would not approve the said sale/transfer of the shares in CTK Co (the 'Sale Shares').

(b) that the said approval had not been obtained within the stipulated time, ... the Agreement has determined or has become unenforceable and void.

(c) that the respondent had no right to transfer the option shares to himself but could only elect to have a refund of the RM270,000.

[18] The appellant enclosed CTK's cheque for RM270,000 which the respondent returned (see pp 269 & 334 of the appeal record).

[19] On 8 January 1998 the respondent filed the proceedings at the High Court Johor Bahru in the Civil Suit No 22–15–1998(2) whereby the respondent claimed for specific performance of the said agreement dated 16 December 1995.

[20] The respondent then proceeded with his application under O 81 of the RHC.

PROCEEDINGS BEFORE THE HIGH COURT (SEE PP 60–75 OF THE APPEAL RECORD)

[21] At the close of the proceedings the learned High Court judge held:

(a) that the appellant was bound by the clear language of the contract and the intention of the parties by depositing the share certificates and transfer forms in escrow was to dispose of the 32,630 option shares (in SHP) to the respondent or his nominee at the price of RM270,000 if the appellant was unable to transfer and register the sale shares to the respondent within three months.

(b) that upon receiving the full purchase price and delivering up the share certificates and the duly executed transfer forms in respect of the option shares, the appellant became a bare trustee and the respondent the beneficial owner of the 32,630 option shares. A

(c) that the respondent be declared the beneficial (but not the registered) owner of the 32,630 SHP shares because the company (SHP) was not made a party to the action (see p 74 of the appeal record). B

APPEAL BEFORE THE COURT OF APPEAL

[22] The appellant appealed against the decision of the High Court declaring the respondent the beneficial owner of the 32,630 SHP shares. C

[23] The respondent was dissatisfied that the High Court did not also declare the respondent to be the registered owner of the 32,630 SHP shares and filed a cross appeal.

[24] On 3 April 2002 the Court of Appeal dismissed the appellant's appeal with costs. It also dismissed the respondent's cross appeal but made not order as to costs (see pp 25–27 of the appeal record). D

[25] In its written judgment dated 7 July 2003 (see pp 338–369 of the appeal record) the Court of Appeal admitted that it had erred in not allowing the respondent's cross appeal on the grounds that: E

(a) the sale and purchase agreement was unambiguous and clear in that respondent had the election to choose a refund of RM270,000 or the transfer of the 32,630 shares in Son Huut Plantation Sdn Bhd and the respondent elected the latter; F

(b) the appellant cannot compel the respondent to take a refund;

(c) the respondent is the beneficial and legal owner of the 32,630 shares in Son Huut Plantation Sdn Bhd and had a right to have the 32,630 shares transferred and registered in his name as that would give effect to the intention of the parties in depositing the share transfer forms and certificates in escrow with the stakeholders; G

(d) by depositing the 32,630 option shares the parties had agreed that the value of the option shares at the time of the agreement was equivalent to RM270,000 (see p 357 of the appeal record); H

(e) the appellant, being the controlling shareholder of both companies, was the best person to know the value of the shares at the time of sale. Subsequent fluctuations in the price or the value of the shares are not the court's concern and do not alter the bargain made in the agreement; I

(f) the appellant held 30,002 shares out of the 50,002 shares in CKT and was the director together with his mother and brother (the only other

shareholders who held 10,000 shares each) (see pp 309, 310, 361 and 362 of the appeal record);

(g) the appellant had obtained all the requisite clearance and consent of the Board of Directors of Son Huut Plantation Sdn Bhd to deposit the 32,630 shares and transfer forms in escrow with the stakeholders (see p 363 of the appeal record);

(h) as the appellant had the controlling interest in Son Huut Plantation Sdn Bhd and his family members were the only shareholders and directors, the court can make an order to compel the company and the company secretary to give effect to the sale especially since the reason for not transferring is not bona fide ie 'not because approval could not be obtained but because the appellant had wanted to contract out of the agreement';

(i) in the circumstances … equity would favour the respondent in that the appellant should not take advantage of his own wrongdoing.

APPEAL BEFORE THE FEDERAL COURT

Appellant's contention

[26] From the outset and based on the facts of this appeal, the appellant agreed that the intention of the parties was that not only was the beneficial interest in SHP shares was to be transferred but also the legal interest as well and thus the transfer forms were pre-executed and deposited together with the share certificates.

[27] Moreover, the respondent himself had instituted a suit claiming not only the beneficial interest but also the transfer and the registration of SHP shares as well.

[28] However, it is the appellant's contention that such a transfer as requested by the respondent is not possible as the articles of association of SHP had placed certain restrictions on transfer of shares. In particular the appellant relied an arts 33, 34, 35 and 36.

[29] Article 33 allows any member to transfer any share to any member selected by him but restricts the transfer of shares to a non member so long as any member (or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership) is willing to purchase the same at the fair value.

[30] Article 34 requires the proposing transferor to give a notice in writing to the company of his desire to transfer any share. Such notice shall specify the sum he fixes as the fair value and shall constitute the company his agent for the sale of the share to any member of the company at the price so fixed.

[31] Article 35 deals with member's right of pre-emption. It requires the company to give notice to the proposing transferor in case it finds a member willing to purchase the share. Upon receipt of such notice the proposing transferor shall be bound to transfer the share to the purchasing member upon payment of a fair value.

[32] Should the company fail to find a member willing to purchase the share the proposing transferor in accordance with art 36 shall at any time within two months afterwards be at liberty to sell and transfer the share to any person at any price.

[33] It is further contended by the appellant that any transfer of shares in contravention of the articles of association of a company is void and invalid as it offends s 33(1) of the Companies Act 1965 ('the Act').

[34] Section 33(1) reads as follows:

> Subject to this Act the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

[35] In support of the above contention the appellant relied on the case of *Ling Beng Hui & Ors v Ling Beng Sung* [1990] 2 MLJ 186 where after dismissing the preliminary objection of the defendant the court held that the memorandum and articles of association constitute a contract between the members inter se. Every member has a personal right to have the terms of the memorandum and articles observed. A member may enforce his right to have the provisions of the memorandum and articles observed by injunction, either mandatory or prohibitory. The action may be brought directly against the other members, and the company does not have to be joined as a party (see also *Gan Sin Tuan v Chew Kian Kor* [1958] MLJ 62 and *Mohamed Yahaya v MS Ally Sdn Bhd & 11 Ors* [1985] 1 MLJ 243).

[36] Since the provisions of arts 33, 34, 35 and 36 have not been complied with the respondent cannot proceed to transfer and register the shares in his favour. Clearly the right to decide whether to register or not to register the SHP share rests with the Board of Directors of SHP and in the instant case art 37 confers upon the Board of Directors an absolute discretion.

[37] According to the appellant there is no evidence that the respondent had applied for approval or that the Board of Directors had in any way wrongly exercised their discretion not to register. As such it was urged upon us to answer the question posed in favour of the appellant and dismiss the respondent's cross-appeal.

Respondent's contention

[38] Contrary to the appellant's contention learned counsel for the respondent submitted that the answer to the issue as posed lies in s 6A of the Act. In particular he relied on ss 6A(2), (6) and (10).

[39] Section 6A of the Act came into force on 1 February 1986 by the Companies (Amendment) Act 1985, ie Act A616. Section 6A is the statutory recognition that beneficial interest in share passes (without the legal/ registrable interest) notwithstanding that the conditions or articles restricting the transfer of share have not been fulfilled.

[40] Section 6A(6) recognises four categories of interest and the language employed is wide in its scope and the respondent's interest clearly falls under ss 6A(6)(a), (b) and (c).

[41] The provisions in the articles of association of a company are only concerned with the restriction on transfer of shares for the purpose of registration in the company's records and register. The company only recognises members who are registered on its records as members. There is no bar or prohibition against the passing of the beneficial interest in the shares of a company either in the Act or the articles of association.

[42] This court need go no further than s 6A of the Act. The same amending Act, ie Act A616 introduced s 69 which also recognises beneficial interest but provides for disclosure of information of such beneficial interest in companies listed in the Stock Exchange.

Respondent's cross-appeal

[43] In so far as the cross-appeal is concerned learned counsel submitted that the respondent is entitled to a declaration that he is both the beneficial and legal (registered) owner of the 32,630 SHP shares. The respondent's claim to the legal and registrable interest in the 32,630 SHP shares is based on the premise that, on the facts of this case, there has been compliance with the articles of association of SHP pertaining to the transfer of shares. This court therefore ought to give effect to the written judgment of the Court of Appeal wherein it clearly admitted on hindsight that it had erred in dismissing the respondent's cross-appeal.

COURT'S FINDINGS

[44] The appellant's appeal to this court against the orders of the High Court and the Court of Appeal is that not even the beneficial interest can pass from the vendor to the purchaser if there is non-compliance with the restriction on transfer of shares provisions in the articles of association.

[45] The central issue in this appeal is whether beneficial interest in shares can pass where there is non-compliance with the restriction on transfer of shares provisions in the articles of association.

[46] In addressing this issue, we would agree with the submission of learned counsel for the respondent that the answer is obvious, clear and emphatic and finds statutory force in s 6A(6) of the Companies Act 1965. To that extent we consider that the question posed to this court is quite superfluous.

[47] Section 6A(6) reads as follows:

> (6) A person shall be deemed to have an interest in a share in any one or more of the following circumstances where he—
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> (a) has entered into a contract to purchase a share; or
>
> (b) has a right, otherwise than by reason of having an interest under a trust, to have a share transferred to himself or to his order, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not; or
>
> (c) has the right to acquire a share or an interest in a share, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not; or
>
> …

[48] Further s 6A(10)(c) provides:

> (10) An interest in a share shall not be disregarded by reason only of —
>
> (a) …
>
> (b) …
>
> (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made subject to restraint or restriction; or
>
> (d) …

[49] From the reading of s 6A(6) it becomes obvious to us that it gives statutory recognition to beneficial interest in shares without the legal (or registrable) interest and the respondent's interest clearly falls under s 6A(6)(a), (b) and (c).

[50] P Lipton and A Herzberg in their book *Understanding Company Law* (7th Ed) had this to say on the issue of transferability of shares (at p 269):

> A transfer of shares occurs when ownership of shares passes from one shareholder to another. This results in the transferee becoming a member of the company after the name of the transferee is entered in the register of members. The transferor ceases to be a member if the entire shareholding is transferred. As a general rule, shares in a company are presumed to be freely transferable. This is an important characteristic of companies and is a great advantage over partnerships.

[51] And earlier at p 266 it was stated thus:

> A member of a company may hold shares in the capacity of trustee for a particular beneficiary. This is often done as part of scheme to reduce taxation or to conceal the real identity of a shareholder.

[52] The provisions as to the lodgement of proper forms or instrument of transfer and restrictions on 'transfer' to non-members without the right of first refusal only relate to the registration in the books and records of the company as a member. There is no legal impediment to the beneficial interest passing from a vendor to a purchaser without the legal (or registrable interest) passing.

[53] In *Re Fernlake Pty Ltd* [1994] 12 ACLC 453, it was held by the Supreme Court of Queensland that where the transferor (vendor) and transferee (purchaser) entered into a contract for the sale of shares but the share transfer is not registered by the company for any non-compliance or breach of articles of association the company need only recognise legal interest in the sale shares and is not affected by notice of any trusts. The effect of this is that the company recognises the transferor as holder of the shares until his name is removed from the register and replaced by the name of the transferee.

[54] As regards the transferor and transferee, the property in the shares passes at the time the transferor hands over the signed transfer and share certificate. The transferee becomes the beneficial owner as soon as the contract is made. From this time on, the seller holds the shares as trustee for the buyer. The buyer is said to have an equitable interest (see *Niord Pty Ltd v Adelaide Petroleum NL* [1990] 8 ACLC 684).

[55] Touching on the issue of 'Restrictions on transfer', *Halsbury's Laws of England*, (4th Ed, Vol 7(1)) at p 310 had this to say:

> Articles restricting the transfer of a share are construed as restricting only a transfer of the legal title, and not as preventing the transfer of a beneficial interest therein. Accordingly, a transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares.

[56] The learned authors of *Palmers Company Law* (24th Ed) at p 613, also agree that a 'transfer is incomplete until registered. Pending registration, the transferee has only an equitable right to the shares transferred to him. He does not become the legal owner until his name is entered on the register in respect of these shares'.

[57] *Hawks v McArthur & Ors* [1951] 1 All ER 22 is further authority for the proposition that a transferee having paid the full consideration for shares obtains equitable rights therein, notwithstanding the complete failure to comply with the company's articles to be followed before the shares could be transferred (see also *Liu, Ren-Shuenn v Lee, Chiu-Pin* [1999] 2 CLJ 35*: Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd & Ors* [1988] 3 MLJ 185 and *Gan Sin Tuan v Chew Kian Hor* [1958] MLJ 62).

[58] Walter CM Woon in his book *Company Law* under the heading 'Ownership and transfer of shares' states the position quite explicitly (at p 296):

> A share is movable and not immovable property. Legal title in a share is rested in the person to whom the share is allotted or transferred and whose name is on the register of members in respect of that share. It is also possible for a person to have shares registered in the name of a nominee, who will hold as trustee for him. … .
>
> Equitable interests in shares can arise in the same way as for any other type of property, e.g, by sale or mortgage or declaration of trust. The sale of specific

shares gives to the purchaser an equitable interest in the shares … . The delivery of a share certificate with a blank transfer to a purchaser gives him an equitable interest in the shares.

[59] And further at p 300:

A share is transferable in the manner provided by the articles. In this connexion 'transfer' means the transfer of legal title to shares; equitable ownership may be transferred without the necessity of changing the register of members.

[60] We would observe, therefore, that the law on the issue is well settled that beneficial interest passes to the purchaser of shares upon his full payment and execution of the transfer documents, notwithstanding that the provisions of the articles of association restricting transfer of shares have not been complied. Those restrictions do not affect and have no application or bearing on the passing of beneficial interest and apply only to restrict the registration of legal interest.

[61] We shall now revert to the respondent's cross-appeal.

[62] The respondent's cross-appeal is that the respondent is entitled to a declaration that he is both the beneficial and legal (registered) owner of the 32,630 SHP shares. The respondent's claim to the legal and registrable interest in the 32,630 SHP shares is based on the premise that, on the facts of this case, there has been compliance with the articles of association of SHP pertaining to the transfer of shares.

[63] We feel that the best and contemporaneous evidence that we should consider here is the sale and purchase agreement dated 15 December 1995. By the terms and conditions therein the appellant, agreed to sell to the respondent his 8,039 CKT shares for RM270,000. That sale was expressly conditional as he represented that he did not have the requisite consent to sell and transfer the said 8,039 CKT shares and that it was 'subject to the approval of the board of directors of the said company and the regulations of the said company' (see cll 2 and 3 at p 232 of the appeal record).

[64] In the event the appellant was unable to obtain the requisite consent within three months then the respondent was given the option to transfer to himself the 32,630 SHP shares (see cl 7(b) at p 234 of the appeal record). This option was unconditional and irrevocable and to give efficacy to this intention the appellant did everything that was needed to complete the sale and transfer. He executed blank transfer forms and deposited the relevant share certificates with the solicitors as stakeholders. It must be remembered that the respondent had paid the RM270,000 in advance.

[65] It is also significant to note that at the time of the agreement both CTK and SHP had common directors and shareholders as follows:

(a) the three directors were the appellant, the appellant's mother and brother;

(b) the shareholders were the appellants, his mother and siblings. The appellant had the controlling interest being the owner of 60% of the shares in CKT and 45% of the shares in SHP.

[66] Looking at the sale and purchase agreement in its entirety we feel that the only reasonable interpretation that could be given to it is that since the appellant expressly only reserved the sale of the 8,039 CKT shares to comply with the restrictions as specifically mentioned in cll 2 and 3 but unreservedly executed all documents to effectually transfer the 32,630 SHP shares he had complied with the restrictions, if any, in the articles in SHP.

[67] Article 33 of the articles of association of SHP, in our opinion, does not absolutely prohibit the transfer of shares. Neither does it give an existing member an absolute right to pre-empt a sale. As a matter of fact, art 33 gives rise to the following categories of persons to whom a sale of shares can be effected without any restrictions ie no pre-emption right of members whatsoever:

(a) a member may sell to another member of his choice ie there is no obligation to offer it pro rata to all existing members ie no pre-emptive right;

(b) a member may sell to a non-member selected by the directors who they regard as desirable to admit to membership without offering the proposed sale shares to members ie no pre-emptive right.

[68] However a member desirous of selling shares to a non-member not selected by the directors must first offer the shares for sale to existing members, ie pre-emptive right.

[69] To our minds, the peculiar circumstances in which the appellant executed the blank transfer forms and handed the share certificates of the 32,630 SHP shares and did not make it conditional upon securing the consent and approval of the other members and board of directors is simply because the directors (ie himself, his mother and brother) agreed that the appellant could sell the 32,630 shares to the respondent, who is in fact not a stranger but is the uncle of the appellant and the father of Chan Kok Thian, a substantial shareholder of CTK. This fact is supported by another piece of contemporaneous evidence produced by the appellant himself ie a settlement agreement dated 24 August 1996 (see p 312 of the appeal record) which clearly showed that third parties, including Chan Kok Thian had rendered financial assistance in consideration of which CTK transferred 21.986% of its shares to himself. This fact also goes to show that the members and directors had no objection to non-family members such as the respondent's son being a member. In fact after the appellant, the respondent's son holds the single biggest block of shares in CTK.

[70] It follows therefore that the only reasonable conclusion that could be arrived by the unconditional and irrevocable offer of the option shares is that

the appellant had offered to his family members the right of first refusal to purchase the 32,630 SHP shares but that they were either not willing or did not have the financial means to purchase them. Otherwise there was no need to offer the option shares to the respondent.

[71] For the reasons we have already given above, we agree that the Court of Appeal correctly held the view that there has in fact been compliance with the articles and that the board should be directed to transfer and register the 32,630 SHP shares in the respondent's name. Any refusal by the board is considered mala fide and not in good faith as there was no member willing or able to purchase the shares at the material time and in addition the appellant had secured the board's prior approval to transfer the option shares to the respondent. In the circumstances we would declare that the respondent is both the beneficial and registrable owner of the 32,630 SHP shares.

[72] My learned brother Haidar CJ (Malaya) and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it.

[73] In the result, the appellant's appeal is dismissed with costs and the respondent's cross-appeal is allowed with costs here and below. The deposit made in the appeal is to be paid out to the respondent to account for his taxed costs.

Appeal dismissed. Respondent's cross-appeal allowed.

Reported by I Izzuddin